No. 13772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. N. PAPADAKIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22230 CD.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.
Hon. David W. Ling, District Judge.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Textbook

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APPELLANT'S REPLY BRIEF.

In this our Reply Brief we will attempt to avoid repetition and directly answer the argument of Government counsel. We have fully treated the insufficiency of the evidence as to Gus Papadakis and the prejudicial admission of hearsay evidence as to him. It has not been answered. To say that the Court instructed the jury is no answer to the problem. The evidence was received—evidence concerning which no foundation had been laid to show that he had any knowledge thereof. This we have treated in our Opening Brief with some detail.

I.

The Court Erred in Failing to Properly Instruct on Accomplice and the Subject of Entrapment.

(A) Accomplice.

That Mattis was an accomplice there can be little doubt. The Government's brief says, "There was no evidence that Mattis promoted in any way the scheme to defraud the Government of taxes, etc." (App. Br. pp. 21, 22). The testimony of Mattis himself is all to the contrary. He says that he first met Gus in Hoffman's office (the accountant for Papadakis and employer of Mattis); that they were discussing "cutting the gross and changing inventory and had been getting away with it for years." When he asked if it was not risky, Hoffman replied they had gotten away with it in the past [Rep. Tr. pp. 130, 132]. Thus he commenced work on these returns and did so for years thereafter. All of the work sheets were his. They were admitted in evidence, not a pencil mark thereon was made by this appellant. Mattis alone was the author of the figures. According to Mattis, he would make tentative returns and if not satisfactory, he then altered them [Rep. Tr. pp. 143-149]. He even identified Exhibit 71 as a tentative return which was too high. He then raised the amounts for office supplies, refunds, truck repairs, purchases, etc. He said that he then reduced the tentative return from $30,500.00 to $18,339.00 on the final return, which he prepared and filed [Rep. Tr. pp. 164-165]; that he reduced the inventory over $5,000.00 on one return [Rep. Tr. pp. 173, 174]. See Exhibits 72 and 28. He admitted he knew he was committing a felony [Rep. Tr. pp. 185, 186] in making and filing false returns. Bear in mind all of these work sheets were in Mattis' handwriting,

none of it in the appellant's (Gus). That this man was an accomplice there can be no doubt. Many an accountant has been tried and convicted with the principal for much less than the admitted activities of the informant-accomplice Mattis.

The Applicable Law.

In *McLendon v. United States,* 19 F. 2d 465, 466, *cert. den.* 258 U. S. 620, 66 L. Ed. 795, the Court said:

> "An accomplice is properly defined to be one who is in some way concerned or associated in the commission of the crime; a partaker of the guilt; one who aids or assists or is an accessory. 4 Blacks. Com. 331. And it does not seem doubtful to us that one who first conceives a way to commit a fraud, and the means by which it can be and is committed, and then furnishes the means used to perpetrate it, is an accomplice. An accessory before the fact is an accomplice, within the rules relating to accomplice testimony. 16 C. J. 674, Sec. 1359; People v. Curlee, 53 Cal. 604, 607; Ackley v. United States (C. C. A.), 200 F. 217, 222; Johnson v. State, 58 Tex. Cr. R. 244, 125 S. W. 16, 18; Davis v. State, 55 Tex. Cr. R. 495, 117 S. W. 159, 160, 161; Edwards v. Washington Territory, 1 Wash. T. 195, 196; People v. Swersky, 215 N. Y. 471, 477, 111 N. E. 212.
>
> The evidence in this case so strongly tended to prove that this witness Smith was an accessory and an accomplice of the defendant in the conception and commission of the offense alleged in the indictment in this case that we are unable to resist the conclusion that the court's failure to instruct the jury regarding this issue, and its failure to instruct them with what caution they should consider his testimony, if they concluded he was such an accomplice, was an error

which deprived the defendant of a substantial right in his trial.

Accordingly, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered."

May we also direct the Court's attention to an old case often cited, *Egan v. United States,* 287 Fed. Rep. 958 at 964, where the Court said:

"In many jurisdictions the law forbids the conviction of an accused upon the uncorroborated testimony of an accomplice. But in this jurisdiction such a conviction may be sustained, provided the jury is admonished by the court that the testimony of an accomplice 'ought to be received with suspicion, and with the very greatest care and caution.' (Freed v. United States, 49 App. D. C. 392, 394, 266 Fed. 1012, 1014.)

We have no legislative definition of an accomplice. Section 908 of the District of Columbia Code provides:

'In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories.'

This, however, does not fully meet the case. Nor is section 332, Penal Code U. S. (Comp. St., Sec. 10506), providing that 'whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal,' conclusive on this point. The broader and more comprehensive rule is that any one knowingly and voluntarily co-operating with, aiding, assisting, advising,

> or encouraging another in the commission of a crime is an accomplice; and this is true, regardless of the degree of his guilt. 1 Russell's Crimes, 49; Wharton's Criminal Evidence, 440; Rice's Criminal Evidence, Sec. 319; Bishop's Criminal Procedure, Sec. 1159."

The law as to accomplices is legion, and the general effect of the decisions is to the effect that where there is evidence that a witness is an accomplice, it is error to fail to properly instruct the jury. (See 22 C. J. S., Vol. 22, Sec. 784, p. 1334.)

In view of the evidence in this case, we again renew our contention that the Court erred in not properly instructing the jury on the law of accomplice, and the appellant was thus denied a fair trial.

(B) Entrapment.

We have covered the evidence quite fully in our statement of the evidence in the Opening Brief, and do not here wish to repeat the same; however, there are some matters we should call the Court's attention to. It must be borne in mind, as we have heretofore pointed out, that Mattis testified that he met Gus, the appellant, when he, Mattis, first went to work for Hoffman, who had made out the returns for years for the Papadakis family, and thereafter it was he who worked up the figures, made out tentative returns, figured and computed the taxes, and then made the final returns. It should be remembered, as we have pointed out heretofore, that in each instance he said that the idea of making improper deductions, of altering the inventory, increasing purchases, increasing expenses, improperly charging expenses, was suggested to him by

Gus. In connection with his testimony it should be kept in mind that for almost three years after he had been to the Government and after he had filed a letter by which he sought to obtain a reward for any money obtained by the Government from the Papadakis family, that he, Mattis, continued to share the confidence of these people; he had lunch with Papadakis, went to his home, and in every instance all of the work sheets in evidence here were in his handwriting; the figures were all his. He says, of course, the idea of alteration or fraud was suggested by Gus. That is his testimony. Gus denies this.

Gus denied that he ever suggested to Mattis that any false returns be made; that any unlawful deductions be made. He states that over the period of years, information had been gathered. It had been taken to Mattis, and that Mattis prepared the returns [Rep. Tr. p. 612]; that the books of the business were kept in the individual stores by the manager there, and the figures were given by the manager to Gus, who assembled them and took them to Mattis [Rep. Tr. pp. 610, 611]; that he never at any time told Mattis to take $10,000.00, or $15,000.00, off of the gross receipts; that he never stated he wanted to add to the purchases; that he was aware that all of the distributors from whom they purchased goods kept complete records of sales; that he did talk with Mattis about various items that could properly be deducted as they prepared their returns [Rep. Tr. pp. 613, 615]. That at one time he talked with Mattis about the inventory, Mattis suggesting that it was high, and he replied that business had picked up and they had to carry a larger inventory; that they had a discussion about slow moving or stale merchandise; that he took an accurate inventory and listed every bottle as nearly as he could [Rep. Tr. p. 616], and he dis-

cussed with Mattis how they might legitimately lower their taxes. That he told Mattis the inventory was as complete as he could take it, and Mattis stated that if you have obsolete goods or old goods which you have carried on your shelves, they would have a right to take a deduction from their inventory; that he told Mattis they had considerable of such merchandise [Rep. Tr. pp. 616, 617]; that he went back and inventoried, and he checked the obsolete goods that they had in the stores and in the warehouse, and he estimated it was $4,000.00 to $4,500.00 at least, and the inventory was then reduced $5,000.00 by Mattis, but only after he had rechecked the inventory [Rep. Tr. p. 617]; that he never at any time told Mattis to knock off $10,000.00; that in his discussions with Mattis they only discussed legitimate ways of reducing the tax; that he gave to Mattis all the figures he had and Mattis made and figured the income tax returns [Rep. Tr. pp. 617, 618]; that many times Mattis filed the returns after they had been signed [Rep. Tr. p. 619]; that he never at any time entered into any discussion with Hoffman, Mattis, his father or mother, as to any improper reduction or alteration of the receipts or income or any understanding to increase the expenses [Rep. Tr. p. 621]; that he did not keep the books from 1946 until 1949 after he had returned from the service, then the only book he kept was the hotel rental book for his father; that he never made any false entries in any of the books [Rep. Tr. pp. 621, 622]; he denied that he had ever suggested to Mattis that the gross receipts be cut $10,000.00 [Rep. Tr. p. 623].

That at times he discussed with Mattis as to what deductions might be made for construction purposes, repairs, electrical signs, and with reference to the Neon

sign costing $614.91, he said that Mattis himself suggested they make that deduction and if the Government did not allow it, they would capitalize it [Rep. Tr. pp. 641, 642]. That there was a discussion about an item of $500.00 deducted for traveling expenses; that Mattis suggested that inasmuch as he, Gus, had to travel from store to store picking up receipts, going to the bank, he had a right to charge these travel expenses, and he did; that it was Mattis' suggestion [Rep. Tr. pp. 642, 643]; that with reference to construction costs he discussed that with Mattis; he had to completely rewire the stores because of a suggestion of the electrical inspector of the City of San Pedro [Rep. Tr. pp. 644, 645].

In closing, we want to pass comment upon the statement that Gus attempted to bribe Agent Wilbur. The facts are that Wilbur, who had become quite friendly with Gus, and who admitted on cross-examination that Gus had been more than cooperative, had furnished him records, had shown him boxes of invoices, had gone with him to the different stores. The day came when Wilbur, according to Gus, wanted to know if Gus had an attorney to represent him [Rep. Tr. p. 635], and Gus said he didn't know why he needed an attorney; that they were not afraid of the audit. Again Wilbur asked him if he didn't have an attorney. Gus said he didn't think he needed one; that his books were fair. Wilbur suggested if Gus had an attorney, "I perhaps can go talk to him" [Rep. Tr. p. 636]. Gus was puzzled as to what Wilbur wanted, and told Wilbur, "I don't understand what you mean. You are continually asking me if I have someone to represent me and I have persisted in saying that I didn't." He then wrote a figure on the top of a liquor case and asked Wilbur, "Is that what you want?" [Rep. Tr. pp. 636, 637.]

It is significant in this case that Wilbur did not rush to his office. It was a day or two before he made any report of this transaction, and Gus was never arrested and charged with an attempt to bribe an officer. I think we can assume that if the Government thought there was any merit in this at all, Gus would have been promptly arrested. Honest Government officials would have been alert to arrest an attempted briber, and at once. This whole case sounds as though they were trying to entrap these people. This conduct almost proves it.

The Applicable Law.

We respectfully direct the Court's attention to the case of *Sorrells v. United States,* 287 U. S. 435 at 444, 445, 77 L. Ed. 413, where the subject of entrapment is fully treated. We again call the Court's attention to the case of *Lufty v. United States,* only recently decided by this Court on the subject of entrapment, 198 F. 2d 761. (See also, *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60.)

There were two sets of facts in the Papadakis case, and the jury should have been properly instructed upon the subject of entrapment. It was for them to determine the fact under proper guidance of the Court. Our instructions proffered and heretofore referred to in the opening brief, were appropriate and should have been given.

Wherefore the appellant, Gus Papadakis, respectfully prays that the judgment of the Court below be reversed.

Respectfully submitted,

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